



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE KING'S COUNCIL AND THE CHANCERY, I.

THE king's council is known as the original authority from which the court of chancery sprang. "As the Law Courts had branched from the 'Curia Regis', so the Chancery", it is said, "began to separate from the Council",¹ but the steps by which the process of separation was carried out have not been known. What was the difference, moreover, between the council and the chancery at the time of division has never been told. That such a problem should still remain unsolved has been due not to want of attention on the part of historians, but to the difficulties encountered. As Palgrave has explained, "partly from the absence of records, and partly from their ambiguity, the history of the Council, a Tribunal which occupied the most prominent station in the government of the country, is involved in great obscurity."²

Much of this obscurity has arisen from a failure to realize that the history of the council lies not in a single line of records but in several. Of these the archives of the chancery are the most abundant, the most accessible, and the best known, from which has been derived nearly all that has been written upon the subject. A different view of the council in many of its activities may be obtained from the rolls of the exchequer, which, however, will be drawn upon only a little for the present purpose. Still another aspect is unfolded from certain sources of later origin, less abundant, and as yet not widely known, namely the records of the privy seal, some of which have only recently been discovered.³ As these throw much new light on the history of the council, particularly in its relations with the chancery, they will afford much material for the present article.

As to the early relations of the council and the chancery no fault is to be found with existing accounts, save as a few matters of fact and explanation may still be added. It will be granted as self-evident that the council, having no executive agencies of its own, must operate through one or more of the existing departments of government, whether the exchequer, the chancery, or some other. In the reign of Edward I. it is clear that many important activities of the

¹ Dicey, *Privy Council* (London, 1887), p. 16.

² Palgrave, *Original Authority of the King's Council* (London, 1834), p. 19.

³ Especially the newly compiled Warrants Privy Seal. All the unpublished documents to which I shall refer are in the Public Record Office.

council were in association with the exchequer, under the treasurer as the chief officer. Frequently meeting in the exchequer chamber, sitting with the barons, the councillors made ordinances, which were recorded upon the rolls and were operative through the other agencies of that body. The treasurer also exercised a presiding function, receiving letters of the king with matters for the consideration of the council, which on occasion he was directed to summon.⁴ A procedure of some significance was that of referring to him petitions of suitors in the following manner: "*Mittatur ista petitio thesaurario inclusa in litteris Regis et mandetur eidem quod vocatis illis de consilio Regis Londoniae examinari faciat istam petitionem et contenta in eadem et fieri faciat conquerenti quod fuerit rationis.*"⁵ Cases of this kind were said to be heard *coram thesaurario et consilio*,⁶ and many of these are recorded upon the Memoranda Rolls.

Of the "council at the exchequer", to use a contemporary term, more might be said, but it is sufficient to point out that the beginnings of the "council in chancery" were very similar. At first the chancellor alternated with the treasurer as chief executive officer. He likewise received letters of the king with commands for the council; he was instructed to summon others of the council; he was to receive the petitions of suitors which were to be submitted to the council.⁷ But none of these functions at first belonged to him exclusively. The special advantage of his office lay in his custody of the great seal, which for the issue of letters and writs was more extensively employed by the council than any instruments of the exchequer. Not unnaturally the clerks who wrote the letters were also employed to write the ordinances, and the rolls of the chancery like those of the exchequer became a medium for the council records.

As a secretarial department the chancery was allowed the minimum of discretionary power. In the issue of writs the clerks were permitted of their own initiative to issue only those *in consimili casu*, while all questions of form they were required by statute to refer to the next Parliament.⁸ In fact matters of doubt and ambiguity were more readily referred to the council,⁹ while instruc-

⁴ Ancient Correspondence, vol. XLV., nos. 121, 143, etc.

⁵ Ancient Petitions, no. 11872, endors; also Memoranda Roll, Exchequer, K. R., 35 Edw. I., m. 53.

⁶ *Rotuli Parliamentorum*, I. 214, 375.

⁷ In the ordinance of 8 Edward I., it was enacted that no petition should come before the king and council except by the hands of the chancellor and other chief ministers. Hardy, *Introduction to the Close Rolls*, p. xxviii, *Calendar*, p. 108. The importance of this ordinance as regards the functions of the chancellor has been exaggerated.

⁸ Statutes, 13 Edw. I., c. 24.

⁹ *Calendar of Patent Rolls*, 20 Edw. III., p. 66; 24 Edw. III., p. 209.

tions as to new and unusual writs were received "according to the form ordained by the king and council".¹⁰ So far, indeed, was the chancery dependent upon the council in all matters, that for the purpose of lending their aid and advice it was customary for councillors to meet with the clerks, as with the barons of the exchequer, "to be present in the chancery". Thus in the ordinary proceedings of the chancery, such as the registration of quit-claims, concords, recognizances, and confirmations of charters, the presence of the council is frequently noted. Likewise among the chancery pleas are those designated as "Placita coram Rege et Consilio suo in Cancellaria";¹¹ while cases before the chancellor and council begin to appear upon the Close Rolls.¹² These, however, belong to the purely common-law jurisdiction of the chancery, which was of limited scope and never attained an extensive development, and concerning which there is little to be said. For the ordinary business of the chancellor's office, the presence of the council becomes less noticeable and in 1376 was declared to be unnecessary.¹³

It is rather in the exercise of an extraordinary jurisdiction that the attendance of the council was most essential, and that the chancery acquired its special importance. The beginning of a special procedure may be noted in the early years of Edward I., when the king by a letter of the privy seal refers to the chancellor a petition in the following manner: "Mandamus vobis quod inspecta petitione . . . quam vobis mittimus inclusam, et habita super ea deliberatione coram vobis et consilio nostro ibidem ulterius inde fieri faciatis quod de iure et gratia curie nostre videritis faciendum."¹⁴ Such a letter became the preliminary writ which was necessary for an adjudication in chancery. At the time, however, it did not differ materially in content from others which were directed to the regent¹⁵ or to the treasurer, one of which has been quoted. Another form of address, which reveals in the beginning an uncertainty of procedure, was "to the treasurer, the chancellor, and others of the council".¹⁶ Not until the reign of Edward III. can it be said that reference to the council was regularly made through the chancellor rather than through the treasurer.

¹⁰ Ancient Petitions, nos. 14570, 14573, etc.

¹¹ Placita in Cancellaria, 30 Edw. I., no. 37; 34 Edw. I., no. 1 A; 18 Edw. III., no. 16; 21 Edw. III., no. 21, etc.

¹² *Calendar of Close Rolls*, 30 Edw. I., p. 365; 34 Edw. I., p. 395.

¹³ *Rot. Parl.*, II. 322.

¹⁴ Warrants in Chancery (Privy Seal), 11 Edw. I., no. 151; October 14.

¹⁵ Ancient Correspondence, vol. XLV., nos. 155, 156, etc.

¹⁶ Memoranda Roll, Exchequer, K. R., 35 Edw. I., m. 41; also Hall, *Formula Book of English Documents* (Cambridge, 1908), p. 100.

In this connection it must be remembered that between the various departments and courts there tended to be much jealousy and contention. The clerks of the chancery in particular maintained with the officials of the exchequer a rivalry which was to a degree reflected in their records. The distortion which has been caused by a reading of the chancery records alone is apparent, when these are supplemented by the rolls of the exchequer. By the aid of the latter it becomes clear that, in his relations with the council, the primacy of the chancellor over the treasurer was not accomplished without a struggle, which seems to have culminated in the fifth year of Edward II., when the chancellor caused the suspension of the treasurer from his office.¹⁷ Apart from the political struggle, however, a special advantage in favor of the chancery appeared in certain writs, namely the *quibusdam certis de causis* and the *sub poena*, which were soon devised in that office.¹⁸ These became an essential feature of council procedure, as will later be described, and served to identify that body the more closely with the *officina brevium*.

The committal of cases to the chancery was largely increased by Parliament and the council, which were constantly overburdened with the suits of private parties.¹⁹ From the reign of Edward II. the Parliament Rolls are filled with petitions which were endorsed in the following manner: "Soit ceste petitioun maunde en chauncellerie . . . et le chaunceller appelez devant lui ceux qui sont appeller face outre droit et reson."²⁰ Sometimes the order was sent by the king's writ, *per litteras Regis*, but ordinarily the endorsement upon the petition was sufficient. That the chancery in such cases acted only under authority was carefully maintained. Thus a petition of the forty-third year of Edward III. was committed with the following direction: "Soit ceste petition mande en chauncellerie et illeque appelez ascunes des grantz du parlement et autres du conseil le Roi", etc.²¹ More often it was expressed that the chancellor was to have power "by authority of parliament".²² The connection between Parliament and the chancery was the more close, no doubt, since from the beginning of Edward III.'s reign the clerical

¹⁷ Memoranda Roll, Exchequer, K. R., 5 Edw. II., m. 41.

¹⁸ Palgrave, *Original Authority*, pp. 40-41.

¹⁹ Thus a petition of the burghers of Oxford, seeking a confirmation of their liberties, declared that they had tried at various Parliaments, but had been delayed "por les hautes busoignes le Roi". It was endorsed that they should seek the confirmation in the chancery. Ancient Petitions, no. 9994.

²⁰ *Ibid.*, no. 13933; also nos. 9989, 10001, 11182, 12937, etc.

²¹ *Ibid.*, no. 10464.

²² "Ait le chancellor poaire par autorite du parlement de faire venir devaunt lui", etc. *Ibid.*, nos. 9879, 11046, 11531, 11598, etc.

work of Parliament was entirely in the hands of the chancery officials. In a number of instances certainly where there was a choice, cases were sent to the chancery in preference to the other courts.²³ For a long time probably the greater bulk of the judicial business of the chancery was created in this manner. It was a different method of delegation but still by Parliamentary authority, that certain subjects, such as misdemeanors in office,²⁴ foreign appeals,²⁵ and false accusations,²⁶ were by several statutes placed under the jurisdiction of the chancellor and council. An over-emphasis, however, has been made of the ordinances and statutes as marking in some way the beginning of the chancery jurisdiction.

The efficiency and popularity of the hearings in chancery are best shown, in the reign of Edward III., by the frequency with which plaintiffs sought them, in their petitions beseeching the king in the following manner: "Plaise . . . par voz lettres comaunder a votre chaunceller qui assemblez voz justices sergeauntz et autres sages de votre conseil il face ceste busoigne oue toutes les circonstances debatre diligeamment et . . . ils ent facent ordainer si covenable remede".²⁷ A suitor of the reign of Richard II. looks to his surest means of assistance when he asks that as the council was not to meet before Michaelmas the chancellor be commanded to assemble it without delay.²⁸

The court which the chancellor was instructed to assemble was the council, sometimes including "the lords and those skilled in the law", or more often those of the council "who ought to be summoned", "whom he sees fit", or "come fait a faire".²⁹ It was left, therefore, largely to his discretion how many bishops, lords, justices, sergeants-at-law, and clerks should be called; although an obligation to summon an appropriate number is once suggested in a demurrer that there was not a sufficiency of learned men present to do justice.³⁰ For yet an indefinite time it was not a fixed tribunal, but ever an assemblage called *ad hoc*, according to the nature of the case. Sometimes there were jurists only, sometimes mainly

²³ Ancient Petitions, nos. 9975, 12841, 15564.

²⁴ Statutes, 20 Edw. III., c. 6; 36 Edw. III., c. 9.

²⁵ *Ibid.*, 27 Edw. III., c. 1; 38 Edw. III., cc. 2 and 3.

²⁶ *Ibid.*, 37 Edw. III., c. 18; 38 Edw. III., c. 9; 42 Edw. III., c. 3; 17 Rich. II., c. 6.

²⁷ This is of 21 Edw. III., Ancient Petitions, no. 12144. Some are earlier, e. g., no. 12220 is of 17 Edw. III.

²⁸ Warrants Privy Seal, series I., section II., file 6.

²⁹ "Appellez a vous ceux de notre Conseil queux vous verrez qe serroit a ce appeller", was a common form. Warrants in Chancery (Privy Seal), no. 10724; *Rot. Parl.*, I. 362, etc.

³⁰ The Molyns case, *Cal. Pat. Rolls*, 20 Edw. III., p. 136.

lords, who constituted the court under the chancellor. Neither were there at first any special subjects of jurisdiction, but cases were referred apparently on no other ground than that of convenience and expediency.

Cases were said to be heard "before the chancellor and others of the council".³¹ In the records which frequently appear upon the rolls, the presiding function of the chancellor is plainly indicated. He summons the parties;³² assigns a day for the case;³³ addresses a question to the litigants;³⁴ answers a demurrer;³⁵ admits an attorney in spite of the objections of other councillors;³⁶ dismisses a case on his own responsibility;³⁷ and delivers the mandate of the court.³⁸ For his influence in the Melsa case, 1356-1367, it is confessed that he was extensively bribed.³⁹ It was once alleged as an error in a plea that the judgment was rendered by the chief justice of common pleas in the absence of the chancellor.⁴⁰ The other members of the council are represented as assessors or advisers, when in the reign of Richard II. the chancellor was instructed to act "by his discretion with the advice of the council".⁴¹ It is important to observe, however, that for the rendering of decrees the participation of the council was still essential, for as yet in the fourteenth century none were stated as rendered on the authority of the chancellor, but on that of the council—*ordinatum* or *decretum est per concilium* being still the proper form.

Thus far the chancery has been represented solely in the light of a subordinate authority, requiring for its judicial actions in every instance a preliminary writ or order. It is now possible to consider some of the steps by which the chancellor acquired a greater degree of independence, proceeding in judicial matters upon his own authority. "It may readily be supposed", as Dicey says, "that the pressure of other business, and a distaste for the niceties of legal discussion, made the Council glad to first refer matters of law to the Chancellor, and next to leave them entirely to his decision."⁴² The first signs of an advance in this direction come in the petitions

³¹ *Cal. Pat. Rolls*, 18 Edw. III., p. 409; 21 Edw. III., p. 413.

³² *Ibid.*, 20 Edw. III., p. 136.

³³ Ancient Petitions, no. 12289, 23 Edw. III.

³⁴ *Cal. Close Rolls*, 26 Edw. III., p. 470.

³⁵ The Audeley case, *Close Roll*, 40 Edw. III., m. 15; 41 Edw. III., m. 13.

³⁶ *Chron. de Melsa* (Rolls Series), III. 135.

³⁷ Baildon, *Select Cases in Chancery* (Selden Society, London, 1896), no. 106.

³⁸ Ancient Petitions, no. 14957.

³⁹ *Chron. de Melsa*, III. 135.

⁴⁰ Ancient Petitions, no. 11094.

⁴¹ *Rot. Parl.*, III. 14, 140.

⁴² *Privy Council*, pp. 16-17.

which suitors began to address to the chancellor instead of to the king and council.

As it was a custom to direct petitions to any of the ministers for writs, letters, and other matters within their ordinary official powers, it was natural to appeal to the chancellor also for his influence in the council. Thus in the reign of Edward I. John de Langton was besought in the following terms: "Vous pri et requer pur lamour de moy que . . . voy donez teu remede com la court peut suffrir."⁴³ In the nineteenth year of Edward II. the chancellor was asked to regard a petition which was delivered in Parliament and to answer *par comun conseil*.⁴⁴ In a petition to the chancellor of the second or third year of Edward III. the keeper of the forest of Galtres complains of a conspiracy to rob the forest and asks, "pleise a vous sire conseiller issi qen cas notre Seigneur le Roi mette remedy."⁴⁵ About the ninth year of the same reign a man made complaint to the chancellor that he had lost money in the king's service, whereupon he was told to come before the council to explain the matter further.⁴⁶ As a means of approach to the council the chancellor became the constant object of appeal for the writs of summons and arrest, thus: "qe vous please granter un brief pour arrester le corps du dit Henry et lui amesner devaunt le conseil de respondre vers le conseil."⁴⁷ To obtain the writ was to begin a council process.

In the same reign there begins to appear a new form in the address of petitions to the chancellor *and* council. It is not strange to find here again an alternative procedure suggested in a petition of about the first year of Edward III., "au Tresorer nostre Seignur le Roi et a son conseil", in which a merchant of Gloucester complains of an attack and robbery which was made off Dover upon his ship by men of Calais. That the chancery, however, was the proper place for such suits was stated in the endorsement, "sequatur in cancellaria et fiat ei sicut fit aliis in consimili casu."⁴⁸ In the twelfth year of Edward III., 1338, a petition for a confirmation of charters was addressed, "Venerabili domino domini nostri Regis illustris cancellario et ipsius consilio".⁴⁹ Of the same year is a petition similarly addressed by a monk and prior of Jersey, who complains that he has suffered loss of goods as though he were an alien,

⁴³ Ancient Correspondence, vol. XXVI., no. 78; also no. 111.

⁴⁴ *Rot. Parl.*, I. 437a.

⁴⁵ Ancient Petitions, no. 15119.

⁴⁶ *Ibid.*, no. 14774.

⁴⁷ *Ibid.*, nos. 14847, 15176, *temp.* Edw. III.; *Calendars of Proceedings in Chancery*, vol. I., p. xii.

⁴⁸ Ancient Petitions, no. 15564.

⁴⁹ *Ibid.*, no. 11961.

whereas he declares he is a native of the island.⁵⁰ From this time scores of legal petitions to the chancellor and council appear, showing in their variety and frequent incorrectness of form a still unsettled usage. One as early as 1340 begins in the following manner:

A [*sic*] treshonorable pier en dieu et lour treschier Seigneur si luy plect sire John par la grace de dieu Erchevesque de Caunterbyrs et Chaunceler notre Seigneur le Roi et au bon conseil le dit notre Seigneur le Roi.⁵¹

Other forms are:

Al Chaunceler et as autres Seigneurs du counsail notre Seigneur le Roy.⁵²

As treshonoree Seigneurs le Chaunceller notre Seigneur le Roy et son tressage conseil en le chauncellerie.⁵³

As treshonourables et tresreverentz seigneurs Chaunceller, Tresorer, Prive Seal, et touz autres honourables et tressages Seigneurs du conseil notre Seigneur le Roi.⁵⁴

These forms may be regarded as transitional, occurring less frequently after the reign of Edward III., when they were superseded by the single address to the chancellor.

That the chancellor might proceed to administer justice upon his own responsibility without a preliminary writ also begins to appear in the reign of Edward III.⁵⁵ This is indicated in the petitions for remedy which were addressed to him—*au chancellor notre Seigneur le Roi*—instead of to the king and council.⁵⁶ The earliest of such petitions which the writer is able to identify is of the years 1343–1345,⁵⁷ after which time they are numerous enough to indicate a frequent though still unusual procedure.⁵⁸ In the reign of Richard II. they occur in such numbers and regularity of form as to reveal an established usage and to indicate the beginning of the separation of the chancery court from the council.⁵⁹

⁵⁰ Ancient Petitions, no. 13077, translated in Société Jersiaise, *Ancient Petitions* (Jersey, 1902), p. 66.

⁵¹ Ancient Petitions, no. 14915.

⁵² *Ibid.*, no. 10471, 28 Edw. III.

⁵³ *Ibid.*, nos. 15740, 14755, 15781, etc.

⁵⁴ *Ibid.*, no. 14955, 10 Rich. II.

⁵⁵ An instance purporting to be of 14 Edward III. is quoted in Spence, *Equitable Jurisdiction of the Court of Chancery*, I. 338. The reference is an error, however, as the passage is taken from the reign of Edward IV., not from that of Edward III.

⁵⁶ Ancient Petitions, file 303, contains many.

⁵⁷ *Ibid.*, no. 14865.

⁵⁸ *Ibid.*, no. 12289, in which mention is made of a suit begun by bill addressed to the chancellor of 27 Edward III. No. 15074 is a notable one of 38 Edward III., given in Hardy, *Introduction to the Close Rolls*, p. xxix. No. 15149 is of the 40th year, and no. 15124 of the 48th year. There are, I am sure, a great many more, but it is not always possible to date them.

⁵⁹ Ancient Petitions, files 301, 302, and especially file 332. Also Baildon, *Cases in Chancery*, nos. 107 ff.

They contain a recital of one or another of the common grievances, such as violent attack, fraud, seizures at sea, and inability to obtain remedy in the ordinary courts. They plead for remedy in terms like the following: "pur quei le dit X prie votre gracieuse Seignurie que vous ordinez remede, pour lonneur de dieu et en oevre de charite."⁶⁰

More elaborate forms of address also appear. To the simple form *au chancellor* of the earlier petitions are now added "reverend father in God", "honorable", "gracious", "sage", or "puissant lord". Something of a judicial title is expressed in the words *votre droiturele Seignurie*.⁶¹ At this time, also, the address is placed in the upper margin of the parchment apart from the body of the bill. The reasons which guided suitors in thus addressing their petitions to the chancellor seem perfectly clear. There was in the first place his influence in the council, which for a time was shared by the treasurer; there was also his peculiar function of issuing the necessary writs; and above all there was recognized his power as an executive officer in enforcing the law. This last consideration was expressed by a plaintiff who in 1388 asked the chancellor to proceed against his enemy, "et en oevre de charite luy chastier come vous bien puissez de votre droiturele Seignurie";⁶² and again within the years 1391-1396, "depuisue vous avetz les leyes souverainment a gouverner desouz notre Seigneur le Roy et sa pees a mayntenir et tielx riotes a contreester et des malefeassours et rebelx deinz la Roialme pur duement punire et chastier."⁶³ To practical considerations such as these the popularity of the chancellor's court is due, rather than to any theory of his position as "holding the prerogative of the king's grace" or as "keeper of the king's conscience", which was as yet unformulated.

The exact stage of development which was reached by the reign of Richard II. is perhaps best shown by a certain well-expressed petition within the years 1389-1391.⁶⁴ It was addressed to the chancellor, William of Wykeham, complaining of a seizure at sea, and prayed him to consider the matter and ordain remedy. In the endorsement it is recorded that the hearing was before the council, by whose authority the decree was made awarding damages, whereupon the mandate of the court was given by the chancellor. As thus established the constitution of the chancery was little changed during the fifteenth century. The council remained but with a tendency to be represented by regular officials, such as the serjeants-

⁶⁰ Ancient Petitions, nos. 12264, 13313, etc.

⁶¹ *Ibid.*, no. 15085.

⁶² *Ibid.*, no. 15085.

⁶³ *Ibid.*, no. 15216.

⁶⁴ *Ibid.*, no. 14957.

at-law, and the "masters in chancery". Decrees of the chancellor are mentioned in the reign of Henry V.,⁶⁵ and in the reign of Edward IV. are issued "by the chancellor and the authority of the chancery".⁶⁶ It should be understood, moreover, that with the new direct jurisdiction of the chancellor the older method of reference to the chancery by the king, the council, and the Parliament was by no means superseded. In the time of Richard II. the chancery petitions were as yet a small class and the greater bulk of chancery business was still in its subordinate relation.

At this point we may leave the development of the court of chancery with the statement that it was not a separation from the council so much as a specialization of that body in one sphere of its activities. At the same time there were other modes of council action which must now be considered to explain further the differentiation of the chancery.

The recognition of the chancery as a different or at least an alternative authority to that of the council begins to be signified in the later years of Edward III. by such expressions as "en la chauncellerie ou devant le conseil".⁶⁷ In the reign of Richard II. there are two distinct judicial authorities indicated in the statement that parties were to respond "devaunt le conseil notre Seigneur le Roi ou devaunt le chancellor en le chancellerie des tortz et grevances susditz".⁶⁸ In the twelfth year of the same reign a petition asking that certain disturbers of the peace be brought to the chancery was answered by a writ to have them come before the council.⁶⁹

Now what distinction is implied in the alternative of the council or the chancery? At first sight it would seem to be immaterial whether it were the council in which the chancellor was still the chief officer or the chancellor acting with the assistance of the council. In the words of Dicey again, "there is little reason to suppose that in the fifteenth century persons brought before the Council and those summoned to the presence of the Chancellor came before an essentially different court."⁷⁰ In point of personnel at the time of Richard II. surely there was no difference, except that in the chancery it was the justices and other legal men of the council rather than the lords who were more regularly summoned, while the clerks

⁶⁵ "Omnia acta et actitata . . . per Dominum Cancellarium decreta conscribant." Sanders, *Orders in Chancery*, vol. I., pt. I., p. 7c.

⁶⁶ *Calendars of Proceedings in Chancery*, vol. I., pp. xcvi ff.

⁶⁷ Statutes, 27 Edw. III., c. 1; Ancient Petitions, no. 12318, 39 Edw. III.

⁶⁸ Ancient Petitions, nos. E 1006, 11028, 14754; *Cal. Pat. Rolls*, 11 Rich. II., p. 283; *Rot. Parl.*, III. 267, 323, 471, which have been pointed out by Mr. Baildon, *op. cit.*, p. xvii.

⁶⁹ Ancient Petitions, nos. 11076, 11077.

⁷⁰ *Privy Council*, p. 70.

also were regarded as an integral part of the court.⁷¹ It is of some significance too that at this time the council under pressure of Parliament became more than ever before a political body.⁷² This distinction, however, has little weight compared with a certain difference of procedure which steadily widened and caused the ultimate separation of the two courts.

The root of a new development lay in the extended use of the privy seal, which for many purposes came to supersede the great seal, while the office of the privy seal became a department comparable in importance with the chancery. This was partly no doubt to relieve the chancery of a great bulk of business, but more because of the greater convenience and less formality attending the use of the minor seal. According to the long-established customs of the chancery letters of the great seal must be written upon parchment, in the Latin language, and were encumbered with tedious formulae; except the writs of accepted usage they could not be issued without a warrant, and were likely thereafter to be enrolled. The chancery also labored under the afore-mentioned statutory restriction that new writs should not be framed without the sanction of Parliament.

It was against these limitations and inconveniences that the privy seal was originally devised for purposes of royal communications. Written in French and later in English, not necessarily upon parchment, of simpler and briefer form, these letters could be issued without a warrant, and were never enrolled.⁷³ By reason of these and other advantages of expedition and secrecy, the privy seal was seized upon by more than one of the government departments,⁷⁴ and became the direct and official medium of the council, while the king for purposes more exclusively his own fell back upon the signet. In the reign of Edward III. the keeper of the privy seal became one of the three principal officers of the council and for certain purposes its immediate executive.⁷⁵ In 1349 it was ordained that petitions of grace, such as were usually considered by the council, should be brought either to the chancellor or the keeper of the privy seal.⁷⁶ In 1390 an ordinance was made that petitions of the people should be examined before the keeper of the privy seal

⁷¹ In the year 1406 the court of chancery is described as "cancellarius cum co-officialibus suis et alio [sic] consilio regio". *Chron. de Melsa*, III. 300.

⁷² My article in the *AMERICAN HISTORICAL REVIEW* (1906), XII. 1-14.

⁷³ For a diplomatic study, see Déprez, *Le Sceau Privé* (Paris, 1908).

⁷⁴ The privy seal was the special instrument of the wardrobe. See article of Professor Tout, *English Historical Review* (July, 1909), p. 496.

⁷⁵ "Notre Seigneur le Roy graunta ceste supplication sur lavis de son conseil et bailla mesme la bille au Gardein de son prive seel par celle cause." *Ancient Petitions*, no. 11119, *temp.* Edw. III.

⁷⁶ *Close Roll*, 22 Edw. III., m. 2d.

and such others of the council as might be present.⁷⁷ His office became the regular channel of council action by means of writs, warrants, and other missives, while the chancery as a secretarial department was thereby one degree removed. For instance, a decree of the king and council was first expressed by a writ of privy seal, which was sent to the chancery as a warrant for an issue under the great seal.⁷⁸ The clerks who wrote the warrants were inevitably employed for the other secretarial work, after a brief period of alternation and rivalry,⁷⁹ displacing the clerks of the chancery, as the latter had once superseded those of the exchequer. The first to hold the office of clerk of the council was Master John Prophet in the reign of Richard II., one of the staff of the privy seal as was each of his successors.⁸⁰ In the hands of these men the records of the council and therefore its procedure followed the methods of the newer office which differed materially from those of the chancery. The chirography is recognizable as rounder and more cursive, the notes and memoranda were briefer, on thinner parchment, or on paper, in French or English rather than in Latin, the records were kept in files but with no enrollments like those of the chancery, while their final depository was the exchequer treasury instead of the Rolls House or the Tower.⁸¹

In the reign of Richard II. processes by privy seal were fully developed, including not only writs of summons but executory writs as well.⁸² There are evidences at that time of a positive policy on the part of the government to use the council as well as the chancery in rivalry with the common-law courts. The king appointed men to the council with salaries expressly for the purpose of hearing

"Bills of the people of less charge" (Nicolas, *Proceedings of the Privy Council*, I. 18b), Palgrave has understood to mean petitions of poor suitors (*Original Authority*, p. 79). In its connection, however, the "people of less charge" are in distinction from the men "of great charge", namely the dukes and magnates mentioned. My interpretation of the ordinance quoted is that for the consideration of ordinary bills the keeper of the privy seal might take the place of the chancellor in the council.

⁷⁸ *Rot. Parl.*, 17 Rich. II., vol. III., p. 313a.

⁷⁹ There is an instance in which two distinct memoranda were made, one in Latin apparently by a chancery clerk, the other in French by a clerk of the privy seal. Ancient Petitions, nos. 11046, 11047.

⁸⁰ My article, *English Historical Review* (1906), XXI, 17-20.

⁸¹ The great collection of Sir H. Nicolas (*Proceedings of the Privy Council*, 7 vols.) consists entirely of documents of privy seal origin, although this fact is not presented by the editor. The statement that there were no enrollments in the privy seal office needs the qualification that a council register was started in 1391 and begun again in 1422, but this was not for judicial records.

⁸² "Le conseil estoit acordee que le suppliant en ceste bille avera executoires bries et lettres du privee seal." Ancient Petitions, no. 11010 endors.

cases, and their activities in this sphere are well attested.⁸³ The aggression of the council was strenuously resisted in Parliament, objection being expressed particularly to the writs and processes by privy seal.⁸⁴ The increased activity of the council was one of the features of Richard's career of absolutism, and served as one of the causes leading to the revolution of 1399, when the council suffered a check but not a hindrance to its further development in this direction.

In the divergence of the council (privy seal), to make a convenient designation,⁸⁵ and the "council in chancery", as the other continued to be called, differences of record were a fundamental matter which had a practical bearing in all administration and judicature. With the government there was the alternative between the greater secrecy and dispatch of the one procedure and the greater formality and surer means of record afforded by the other. For these reasons the privy seal was adopted by the council for all its political activities and for such judicature as most affected interests of state. To the suitor, on the other hand, there was offered a measure of choice whether to have his case terminated by writs of privy seal at less cost but without enrollment, or by letters of the great seal at greater expense but with more security. To considerations such as these was it due that the council in time became the great tribunal for criminal trials, and the chancery the court for property cases. The further relations and differentiations of the two bodies or forms of authority, therefore, must be followed in the light of their judicature. This task I shall be permitted to undertake in a succeeding article.

JAMES F. BALDWIN.

⁸³ See my article, "The Privy Council of the Time of Richard II.," *AMERICAN HISTORICAL REVIEW* (1906), XII. 1-14.

⁸⁴ *Rot. Parl.*, III. 21, 44 (§ 49), 266a, etc. In the first year of Henry IV. the Commons prayed that all personal actions be tried at common law and not by writ of privy seal. *Ibid.*, III. 446.

⁸⁵ The "council in star chamber" would be a designation not sufficiently accurate at this time, for the chancery sessions were then frequently held in the Star Chamber. The necessary distinction is one of procedure, not of place.